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IN THE

Supreme Court of the United States

October Term, 1970

MARJORIE WEBSTER JUNIOR COLLEGE, INC.,

Petitioner,

—v.—

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Statutes Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States; Section 3 of the Sherman Antitrust Act, 15 U.S.C. § 3 (Petition, p. 3); provisions of the National Defense Education Act of 1958, the Higher Education Act of 1965 and the Higher Education Amendments of 1968, 20 U.S.C. §§ 401, 402, 435, 1201, 1085. (App., pp. A-1-A-2).

Questions Presented

Whether this Court should review the decision below where:

1. Petitioner has sustained no harm because it lacks accreditation by Respondent?
2. There are no decisions conflicting with the Court of Appeals' refusal to expand the scope of the Sherman Act to include evaluation and accreditation in the field of higher education and with that Court's placing upon Petitioner the burden of proving the unreasonableness of Respondent's standard?
3. That decision is based primarily upon common law principles of admission to private associations, a matter which does not involve a Federal question?

Statement of the Case

MARJORIE WEBSTER. Petitioner Marjorie Webster Junior College, Inc. (Webster) is a for-profit, business corporation in the District of Columbia. It is owned and controlled by the members of one family, who hold most of the administrative and corporate offices and who are its sole stockholders. Established in 1920 as a school of physical education and expression, Webster was incorporated in 1947. Accredited by the District of Columbia Board of Education for nearly 25 years, it has operated successfully as a junior college for women, offering two-year terminal and transfer courses in seven departments, without evaluation and accreditation by Respondent Middle States Association of Col-

leges and Secondary Schools, Inc. (Middle States). Out of 500 students enrolled in the 1966-67 academic year, only 90 or 18% were in the Liberal Arts department.

Webster is one of 35 proprietary institutions of higher education in the United States, which together enroll about 30,000 of the almost seven million students in the 2,500 American institutions of higher education. Webster is one of two proprietary institutions (out of a total of 26 institutions) in the District of Columbia. These two proprietary institutions have about 2,000 students, out of a total of 75,000 college and university students in the District. (J. A.[1] 1375 (44-45).

Middle States. Middle States is a voluntary, nonprofit, non-stock, educational corporation, incorporated on May 27, 1966, under the education laws of the State of New York. Through a predecessor organization, Middle States has been in existence since 1887. The U. S. Office of Education recognizes Middle States as a "non-governmental, voluntary accrediting" organization (DX 145A, App. p. A-4).

Through its Commission on Higher Education, Middle States evaluates and accredits nonprofit liberal arts institutions of higher education in the Middle Atlantic area. Through its own staff and the faculties of member institutions, Middle States provides a "body of experience . . . available to eligible institutions" (J. A. 869). Its membership consists of 346 nonprofit institutions of higher education and 1500 nonprofit institutions of secondary education

[1] J. A. refers to the Joint Appendix submitted to the Court of Appeals, filed in this Court by Respondent.

which have been accredited by Middle States. Membership is concomitant with accreditation.

ACCREDITATION. Accreditation means that evaluation by peer educators has found the institution to have achieved quality within the context of its own aims. In the words of the President of Manhattanville College, an evaluation does not "compare the institution being visited with any other institution like or unlike the one being visited, but only . . . [compares] what it says it is doing with what it seems to us, during our visit, is actually taking place" (J.A. 1001).

Accreditation does not mean that the institution is more qualified than any other accredited or unaccredited institution. Again, as stated by the Manhattanville President:

> "• • • There are accredited institutions at every level of the academic spectrum. The only point they have in common is that they have a single purpose which is to make the institution in question as strong academically as that institution can in view of its purpose." (J.A. 1017)

Since at least 1928, Middle States has limited its membership to nonprofit institutions with boards of trustees representing the public interest. In 1957 the Middle States' membership approved a continuation of this policy because, among other things, "there are certain elements so built into the structure of a proprietary institution as to mitigate against the excellence we seek for accreditation". The proprietary "institution is not devoting all of its resources to the welfare of its students and the upbuilding of its programs." (DX 152 at p. 37).

This standard was further implemented in 1964 when Middle States and five other regional accrediting associations formed the Federation of Regional Accrediting Commissions of Higher Education. Thus, Middle States' evaluation and accreditation process has developed solely with respect to the nonprofit, eleemosynary institution of higher education.

PROCEEDINGS BELOW. Between 1928 and 1966, Webster corresponded with Middle States concerning its eligibility for accreditation. In 1966, Webster instituted suit against Middle States in the United States District Court for the District of Columbia. After an extensive trial,[2] the District Court rendered judgment for Webster on July 23, 1969. The judgment was stayed by the Court of Appeals pending its decision, which was rendered on June 30, 1970. That Court reversed the judgment of the District Court, finding

> ". . . that the Sherman Act is not applicable to Middle States' conduct as indicated by the present record; that the circumstances are not such as to

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[2] Twenty-six witnesses testified for Middle States at the trial. These included the following expert witnesses: Dr. Arthur M. Blum, President, Point Park College; Dr. John S. Brubacher, Professor of Higher Education, Center for the Study of Higher Education, University of Michigan; Charles H. Burton, Esq., Partner, Ash, Bauersfeld and Burton; Dr. Glenn Christensen, President of Middle States and recently retired Provost and Vice President, Lehigh University, presently Professor of English; Calvin L. Crawford, Administrative Secretary, Middle States Association; Alfred D. Donovan, Vice President, Seton Hall University; Dr. John R. Everett, President, New School for Social Research; Dr. Jesse E. Hobson, President, Heald-Hobson Associates, educational consultants; John C. Hoy, Dean for Special Academic Affairs, Wesleyan University; Sister Elizabeth McCormack, President, Manhattanville College; Dr. Albert E. Meder, Jr., recently retired Vice-Provost, Dean of Rutgers University and recently retired Chairman of the Middle States Higher Commission; Martin D. Robbins, Associate, Heald-Hobson Associates; and Dr. John A. Stoops, Dean of the School of Education, Lehigh University.

warrant judicial interference with the accreditation and membership policies of Middle States; and that, assuming the Due Process Clause to be applicable, Marjorie Webster has not sustained its burden of showing the irrationality of the policy in question as applied to bar consideration of Marjorie Webster for accreditation." (Petition, p. A-3).

ARGUMENT

A. Webster Has Successfully Operated A Junior College Since 1947 Without Evaluation And Accreditation By Middle States.

The Court of Appeals held, and Webster concedes, that Webster "has operated successfully as a junior college since 1947" and that the record does not support "the conclusion that appellee will be unable to operate successfully as a junior college unless it is considered for accreditation by . . . [Middle States]" (Petition, pp. A-11, 23, fn. 24).[8] This conceded fact alone warrants denial of the petition.

ENROLLMENT AND APPLICATIONS. In the ten years ending in 1966-67, Webster's enrollment more than doubled to its present size of 500, which Webster has no intention of increasing (J.A. 1479 (58)). Indeed, in October 1965, just eight months before the suit was filed, a Webster Vice President reported to its Board that "[t]he college now had the largest student body in its history. The quality of its students was the highest it has ever been . . ." (DX 568; J.A. 1072).

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[8] The Court of Appeals took the District Court's findings of fact and the uncontested evidence in the record and reached the conclusion, contrary to the District Court, that Webster had not been harmed by lack of Middle States accreditation. Thus, F.R.C.P. Rule 52 is not applicable.

Prior to 1967, applications for Webster showed a steady increase (J.A. 1047; District Court's Finding of Fact (FF) 53, Petition, p. B-36). Since 1967 Webster has experienced, together with all other women's colleges in the District of Columbia, a decline in applications (J.A. 683, 740-792, 1025-1026). This is set forth in graph form on p. A-3.

All women's institutions in the District of Columbia, except Webster, are accredited by Middle States. Women's colleges generally have experienced increasing difficulty in student recruitment because of the rising cost of tuition and increased popularity of co-educational institutions (J.A. 686, 754-55, 792, 1028-29).[4] Special factors adversely affecting applications to women's colleges in the District of Columbia include the April 1968 riots, and wide national publicity given the crime situation here (J.A. 686, 755, 784, 791-92; 1029).

Transfer of Credits. Webster admitted in its 1968-69 catalogue that its graduates "have been accepted with advance standing in approximately two hundred universities throughout the country", double the number for the previous year (DX 999 at p. 26; DX 1001 at p. 25).

Only "twenty-five to thirty percent" of each class transfer, according to Webster (JA. 1046). Acceptance letters for students at Webster indicate whether or not the student is being accepted as a terminal or potential transfer student. Webster produced no substantial evidence at trial that

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[4] Even according to one of Plaintiff's experts, the Executive Director, Center for Educational Policy Research, Harvard University, "'the women's colleges are probably an anachronism'", "'the majority of women's colleges seem to be in special difficulty'", and "'they will grow much less rapidly than coeducational colleges and . . . exert a declining influence on coming generations'" (J.A. 69, 71).

students seeking transfer of credits earned at Webster were denied such transfer because of lack of Middle States' accreditation. Since 1962, only 34 of the approximately 1700 four-year institutions of higher education throughout the United States declined to give full academic credit to Webster students during that period. Only eleven of these institutions refused to accept Webster credits because of its lack of Middle States' accreditation (PX 47a, 47c, 47h, 47q).

Within the Middle States area, only eight four-year institutions—out of nearly 346 members of Middle States, and 500 institutions of higher education of all types in the area—refused to give full academic credit to Webster graduates. Only six such institutions attributed this rejection to Webster's lack of accreditation (J.A. 172, 512-20, 552-68, 522-29, 569-90; PX 47p).

Profitable Operations. Webster has suffered no tangible economic harm by its lack of accreditation. Indeed, the robust figure cut by Webster on its financial statements is not the image of a victim suffering irreparable harm from a conspiracy between the members of Middle States.

Webster's net operating income increased by 206.6% between 1961 and 1967. At least 25% of this increase was experienced since 1966. Webster probably is the only college in the United States distributing 10% bonuses to its faculty members (1967) and having a profit-sharing plan for them. (J.A. 1479 (52-55)). While nationally, total college and total administrative expenses rose 55% and 90%, respectively, between 1961 and 1967, Webster's net operating income tripled during the same period.

Webster's prosperity, of course, is understandable, since it is operated and administered for the economic benefit of the Webster family.[5] Except for an eight-month period in 1966-67, all of the directors, principal officers, and administrative officials at Webster have been members of the family, elected each year by each other. Over $110,000 in salaries is paid out each year to these five persons, and all but one other adult member of the family are also employed by Webster. (J.A. 1479(70)). The only non-family officer ever to serve at Webster—a former department head at American University—resigned as president in February 1967, after only eight months in office, in these words:

> "Today, after nearly eight months of unremitting efforts to discharge the responsibilities and duties of the Office of President of the College in accordance with the highest tradition of professional educators, I am still denied the full support of individual Members of the Board of Directors, including those Members who are also Officers of my Administration. Clearly, I have now no reasonable choice but to resign." (JA. 1479 (104)(3)).

Thirty percent of Webster's expenditures go to proprietary related items—expenditures which a nonprofit institution would not incur. (J.A. 1234; DX 215). This means that out of every dollar of tuition paid, only 70 cents is directed to educational expenditures.

And with regard to educational and general expenditures at Webster, 60.2% of expenditures are devoted to administration and general items. Only 28.3% is devoted to in-

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[5] Indeed, a shift to nonprofit status, according to a Webster Vice President and family member, "could endanger the future employment of the Webster family in the corporation" (J.A. 1479(59)).

struction, and only 0.4% to library. (DX 215). Included in the administrative and general item are the salaries paid the Webster family. The normal breakdown for educational and general expenses in both two-year and four-year colleges is 20-30% for administration, 45-55% for instruction, and 3-6% for library. (J.A. 1253).

Accreditation Status. Webster has been accredited as a junior college, and licensed to award the AA degree, by the District of Columbia Board of Education since 1947. It is therefore listed in Office of Education publications and major references used by high school guidance counsellors. Webster is excluded from certain publications solely because of its proprietary and two-year status and not because it is unaccredited by Middle States. (Petition, p. A-9, fn. 31).

Webster does not receive an alleged inferior symbol in an annual publication of the American Association of Collegiate Registrars and Admission Officers (AACRAO) due solely to its lack of Middle States' accreditation. The publication merely is an exchange of information whereby a university in a particular state or the District of Columbia indicates, by symbols, how it treats credits transferred to it by another local institution.

George Washington University gave Webster a "D" symbol until 1969, when a "C" symbol was indicated. According to that University's Director of Admissions, a witness for Plaintiff, the symbol for Webster was based on "experience" with Webster students and was not required or indicated by Middle States (J.A. 268-269, 284). In 1968 Webster was one of only fourteen institutions of higher education in the United States—and the only one in the District of Columbia—with a "D" symbol. Four hundred

and eighty-four institutions, without accreditation by Middle States or any other regional association, had the "A" or "B" symbols, the highest used by AACRAO (PX 44, DX 102).

Nor does the record support any claim of "stigma" attaching to Webster because of its lack of regional accreditation. In its complaint Webster maintained that "it has received the esteem and respect of educators throughout the United States." Asked the factual basis for this allegation, a Webster Vice President stated:

> "... [T]he acceptance of our students in transfer to some senior colleges throughout the country which means that these colleges have looked favorably upon us, or they wouldn't accept our transfer students." (J.A. 1479(62)).

Federal Funds. Webster suffers no harm from its lack of regional accreditation with respect to available Federal funds. Webster has never applied for Federal funds and admits that it does not need, desire, nor solicit "any funds ... from the federal government, the state government, local community or any religious group" (J.A. 183; 1470(61)).

Even if Webster did attempt to obtain Federal funds, it would be unsuccessful. In all cases in which Federal funds are available to institutions, they are restricted by statute to nonprofit institutions. Thus, a profit-making institution of higher education cannot, as an institution, be eligible to receive Federal funds.

Webster does have a "three-letter certification" at the Office of Education, a statutory alternative to accreditation which can qualify an institution for Federal funding

(App. p. A-2). In addition, many programs state that, in the absence of a nationally recognized accrediting agency which is qualified to accredit a particular class of institutions, the Commissioner of Education shall appoint an Advisory Committee to establish standards pending the establishment of a qualified accrediting agency. See, for example, Higher Education Amendments of 1968, § 435(b) (App. p. A-2).

Only two programs out of the extensive Federal assistance to higher education indirectly involve proprietary institutions—the college work-study program and the National Defense Student loan program. Higher Education Amendments of 1968, § 461(b) (Petition, p. D-4). These programs provide financial assistance to the students attending the institution and not to the institution, which itself is required to provide certain matching funds to eligible students. In 1968, some proprietary institutions—schools which provide at least a six month's program to prepare students for gainful employment in a recognized occupation—became eligible to participate in these two programs. Webster has not sought to participate in these programs, and has disclaimed any interest in them.

The lack of any demonstrable monetary or other damage to Webster alone warrants denial of certiorari. A private antitrust plaintiff must prove the fact of damage as a prerequisite to maintaining the cause of action. Cf. *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 562 (affirming jury verdict where "there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner has sustained some damage, and the measure of

proof necessary to enable the jury to fix it."). Not even "mainly circumstantial" evidence as to harm to Webster appears on the record of this case. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379. No causal relationship was established by Webster on the record between any Middle States' action and any alleged monetary damage or other type of injury to Webster. *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 272 F. Supp. 744, 749 (D. Mass. 1967), *aff'd*, 390 F.2d 113 (1st Cir. 1968), *cert. denied*, 391 U.S. 914.

B. No Decisional Conflict Exists as to the Inapplicability of the Sherman Act to the Evaluation and Accreditation of Institutions of Higher Education.

The Court of Appeals held that the Sherman Act was inapplicable to the facts of this case. (Petition, pp. A-3-A-6). That holding does not conflict with decisions of this Court and with the decisions of other lower courts.

The purpose of the Sherman Act was to proscribe conspiracies and combinations having commercial objectives and it was not intended to apply to the noncommercial aspects of higher education including the liberal arts and the learned professions. (Petition, p. A-5). Prior to passage of the Sherman Act, Justice Story in *The Schooner Nymph* (C.C.) 1 Sumn., 516, 18 Fed. Cas. 935 (No. 10388, 1834) defined the meaning of the word "trade":

> "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned*

professions, it is constantly called a trade." (Emphasis added).[6]

This Court has adopted Justice Story's definition of "trade" as that word is used in Section 3 of the Sherman Act. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 435-436; *United States* v. *National Association of Real Estates Boards*, 339 U.S. 485, 492. The Court there stated that "activity", to be actionable under the Sherman Act, must be essentially commercial in nature.

No such commercial activity is involved in the evaluation and accreditation functions of Middle States. These functions support and enhance the educational efforts of institutions of higher education,[7] traditionally eleemosynary institutions in the history of the common law. *The Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 562 (1819) (argument of Daniel Webster); *U. S. ex rel. Chicago Business College* v. *Payne*, 20 App. D.C. 606, 613 (1902) ("established solely for the public good and not for private gain"); *Cornell University* v. *Messing Bakeries*,

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[6] The District Court incorrectly stated that Middle States was claiming inapplicability of the antitrust laws under the "learned professions" category of the *Nymph* decision. (Petition, p. B-11). The applicable category is "liberal arts". See O'Neill, *The Liability of Private Accrediting Associations under the Sherman Act, the Constitution, and the Common Law*, 11 B. C. Ind. & Com. L. Rev. 285, 295 (1970).

[7] "Just as the distinctive thing about man, which separates him from other gregarious animals, is his capacity for reasoned thought, so the university's basic commitment to thought distinguishes it essentially from most other institutions. It does not seek victories; it does not work for profits; its production is not measurable. Its truest goals are not precise targets, but high ideals—the enrichment of the minds and lives of its students, the advancement of knowledge, the increase of understanding among men, and the unending search for truth." Cohen, *The Human Nature of a University*, UNIVERSITY: A PRINCETON QUARTERLY, No. 42, Fall, 1969 at 4.

138 N.Y.S. 2d 260, 262 (App. Div. 1955), *aff'd*, 309 N.Y. 722, 128 N.E. 2d 421 (1955) (injunction granted to prevent bakery from using University's name; "Equity may also shield the thrust of business into the kind of legal rights acquired in areas entirely removed from commercial activities"); *Beard* v. *Board of Education*, 81 Utah 51, 16 P. 2d 900, 910 (1932) (extracurricular activities of school "a proper and necessary part of our educational system, and hence cannot be considered as carried on for commercial purposes"); *cf. Marston* v. *Ann Arbor Property Managers Ass'n.*, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd.*, 422 F. 2d 836 (6th Cir. 1970). A university is "a community of scholars" where "[t]he readings of the market place are not invariably apt in this noncommercial context." *Greene* v. *Howard University*, 412 F. 2d 1128, 1135 (D.C. Cir. 1969).

This Court consistently has limited the reach of the Sherman Act to those practices which have commercial business aims. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 52; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 492-493; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, fn. 7. When no commercial purpose is involved, this Court has refused to sanction application of the Sherman Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. The Court there stated:

> "The proscriptions of the Act, *tailored as they are for the business world*, are not at all appropriate for application in the political arena." 365 U.S. at 141 (Emphasis added).

The Court of Appeals thus properly held that, since Middle States' "objectives . . . are not commercial",

> ". . . an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of

> the profession, is not sufficient to warrant application of the antitrust laws." (Petition, p. A-5.)

The Court of Appeals' decision conflicts with neither the decisions of this Court nor those of any other Circuit. No conflict exists with *American Medical Association* v. *United States*, 317 U.S. 519. That case involved a dramatically repressive combination motivated by the commercial desire of physicians to protect and enhance their livelihood, at the expense of physicians not members of the Medical Society of the District of Columbia. The record showed that the Society became alarmed at competition by a co-operative membership corporation furnishing medical services at cheaper prices; steps were taken by the Society and the American Medical Association (AMA), including a boycott effected by use of a "white list"; threats of disciplinary action were made against doctors working for the co-operative association; and such doctors were excluded from medical and hospital facilities. 317 US at 532.

AMA, the Medical Society, and other defendants were indicted and convicted for conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act.[8] This Court sustained the convictions. It specifically refused to pass on the issue of whether the practice of medicine constituted "trade":

> "Much argument has been addressed to the question whether a physician's practice of his profession

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[8] First, the District Court sustained a demurrer to the indictment, *United States* v. *American Medical Ass'n.*, 28 F. Supp. 752 (D.D.C. 1939), which was reversed on appeal. 110 F. 2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644. On remand, the defendants were convicted, and this was affirmed on appeal. 130 F. 2d 233 (D.C. Cir. 1942), *aff'd.*, 317 U.S. 519.

> constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid down in the indictment, we need not consider or decide this question." 317 U.S. at 528.

The Court held, as the Court of Appeals here has noted (Petition, p. A-5, fn. 18):

> "Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the *Apex* case places it within the scope of the statute." 317 U.S. at 528-29.

In the *AMA* case, there was no question of the defendants' aim and purpose deliberately to destroy GHA in order to financially protect themselves. The case clearly limits the application of the Sherman Act to the business-like aspects of medical practice.[9] THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 63, fn. 232 (1955); Note, *The Medical Profession and the Sherman Act*, 8 GEO. WASH. L. REV. 1034, 1044-45 (1940).

The instant case is not concerned with the "business-like aspects" of higher education. Webster concedes that the nonprofit criterion does not grow out of economic or businesslike considerations. (Petition, p. A-5). Absent commercial motives, the traditional exclusion of higher education from trade retains its full integrity. The *AMA* case is not in conflict.

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[9] The two Court of Appeals opinions in *AMA* rests on the applicability of common law restraint of trade concepts to the practice of medicine. There is no common law precedent for applying restraint of trade concepts to higher education. Indeed, the contrary is true. *The Schooner Nymph* (C.C.) 1 Summ. 516, 18 Fed. Cas. 506 (No. 10388, 1834).

Nor is there conflict with *Council of Defense of State of New Mexico* v. *International Magazine Co.*, 267 Fed. 390 (8th Cir. 1920). In that case, the New Mexico Council of Defense, established during World War I, campaigned to bar the Hearst publications from sale in New Mexico because of its objection to William Randolph Hearst's views on the war. The Council specifically coerced newsdealers to break their contracts with Hearst and to refrain otherwise from selling Hearst newspapers and magazines. The Court held that the Council's acts "amounted to a conspiracy to boycott or blacklist the magazines published by complainant," and therefore were in violation of the Sherman Act. 267 Fed. at 412. The defendants' "declared and obvious purpose was to destroy complainant's business in New Mexico." *Id.* at 411. This factual situation in no way bears any resemblance to the facts of the instant case.

Other cases which Webster cites to establish that the Sherman Act applies where there is a non-commercial purpose involve factual situations where the intent and purpose to restrain commerce clearly was established on the record. In *United States* v. *Gold*, 115 F. 2d 236 (2d Cir. 1940), the defendant union, in an attempt to unionize the fur garment industry, picketed non-union dresser and dyer plants, attempted to persuade manufacturers not to deal with them, and ordered its own members not to handle any goods from the non-union plants. Defendants were convicted of a conspiracy to restrain trade in violation of the Sherman Act, Citing *Apex, supra*, the Court of Appeals reversed the convictions because no effect of the restraint on the market conditions in New York had been shown. 115 F. 2d at 238.

Fashion Originators Guild of America v. *Federal Trade Commission*, 114 F. 2d 80 (2d Cir. 1940), *aff'd.* 312 U.S. 457,

was an attempt by the Guild to eliminate competition from copiers of original fashions. This was done by placing the names of retailers who sold copies on red cards and the names of retailers who refused to sell copies on white cards. Both sets of cards were distributed to the manufacturers. The obvious reason for the distribution of the cards was to prevent the manufacturers from selling original fashions to any "red card" retailer. This Court held that:

> "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts." 312 U.S. at 467-68.

In *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), General Motors, through its financing subsidiary GMAC, entered into a conspiracy to monopolize and control the financing of new and used General Motors cars. GM dealers were coerced into financing through GMAC to the exclusion of 375 independent finance companies. If various types of pressures brought by GM had not convinced the dealer that he should use GMAC, the dealer's GM franchise would be terminated. The Court held that "[i]t is clear that the evidence in this case tends to show a conspiracy having as its purpose the control by appellants of the dealers' financing." 121 F. 2d at 397.

The decisions of this Court cited by Webster do not conflict with the Court of Appeals' holding below. *United States* v. *Griffith*, 334 U.S. 100 bears no relationship whatsoever to this case. The defendants there operated moving picture theatres in a three-state area. They entered into master

agreements with film distributors which effectively reduced the ability of defendants' competitors to obtain desirable films. This Court premised its finding of a Sherman Act violation on the grounds that Section 2 is aimed, *inter alia*, at the acquisition of "effective market control" which included "the existence of power 'to exclude competition when it is desired to do so.'" 334 U.S. at 107.

In *United States* v. *Patten*, 226 U.S. 525, the defendants were prosecuted under the Sherman Act for conspiracy to control the cotton market on the New York Cotton Exchange. The defendants were "cornering the market" by purchasing excess quantities of cotton futures, withholding them from sale and therefore driving up the prices paid by cotton manufacturers. The purpose of the conspiracy ". . . was to reach and to bring within its dominating influence the entire cotton trade of the country." 226 U.S. at 543.

The defendants in *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30, were film distributors who controlled 60% of all films available for exhibition. Defendants required all exhibitors to enter into a standard contract which provided for compulsory arbitration of any disputes and penalties for failure to submit to arbitration. The arbitration board consisted of 3 members from the local film board of trade (controlled by the distributors) and 3 proprietors or managers of theatres in the region. The Court held that this arrangement violated the Sherman Act, noting:

> " . . . when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal." 282 U.S. at 43.

Finally, in *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, the defendants entered into agreements which were tied to patent licenses to restrict the competitive sale of enameled ironware. The agreements provided for standard prices, rebates on royalties, and prohibited the sale of defective pieces. A committee was established to fix prices and to pass upon any infractions of the agreements. The Court held that the agreements which practically controlled the trade of enameled ironware "from producer to consumer" violated the Sherman Act. 226 U.S. at 48.

C. Middle States' Nonprofit Standard is Reasonable.[10]

Middle States' Higher Commission has been engaged in the evaluation and accreditation of institutions of higher education since 1921. In the early years of its accrediting activity, the Higher Commission applied quantitative standards against which the applicant institution was measured. Easily identifiable factors, such as the degrees held by the faculty and the number of books in the library, predominated in this early form of evaluation.

This quantitative approach to accreditation was found to be unsatisfactory. The results of such quantitative measurements often had little relationship to the actual quality of the institution. (JA. 1111).

In 1946 this experience of the Higher Commission resulted in "Characteristics of Excellence"—a document incorporating a new approach to evaluation and accredita-

[10] The evidentiary value of the alleged "recent study by the United States Office of Education . . . [indicating] that there is no empirical data or research to support the proprietary exclusion" (Petition, p. 7) can be judged by the full transcript dealing with the "study", which shows its genesis by Webster's counsel, secrecy, and lack of any substance whatsoever. (J.A. 385-388).

tion. (J.A. 1414; DX 148). Qualitative standards replaced quantitative standards. The applicant institution today is no longer measured against quantitative minimums. Rather, it is measured in terms of its own goals and resources. The institutions are expected to define their educational goals, utilizing their full resources to that end. This establishes the frame of reference within which they are measured.

In evaluating and considering an institution for accreditation, Middle States does not compare one institution with another (J.A. 873; 1016-17; 1374(30)). Regional accreditation is not a certification that the academic quality of an institution has reached a certain level. (J.A. 1016-17). Accreditation by Middle States assures to the public and to the academic community that within the accredited institution there exists an administration and faculty devoted to the specific commitments of their institution and that the institution devotes all of its resources to educational goals. (J.A. 1374 (29-30)).

Organizational factors vitally affect higher education. (J.A. 1120; 991). The Higher Commission concluded 40 years ago that the commercial pattern of organization was not conducive to the best kind of work in higher education. (J.A. 1420). The evaluative process subsequently developed by Middle States presupposes the presence of nonprofit or public status, a board of trustees representing the public interest, and devotion of all of the resources of the institution to education. (J.A. 980).

The primary function of a Board of Trustees in a nonprofit college or university is to establish an environment conducive to learning. (J.A. 1354). The Board of Trustees must see that the total financial resources of the institution are used for academic endeavor. (J.A. 984). The Board is

charged with representing and holding in trust the public interest. (J.A. 986). Its members serve without compensation, and usually contribute to and assist in raising funds for the institution. (J.A. 1357; 997). Self-aggrandizement of trustees at the expense of the college or university is unconscionable. (J.A. 1427).

Profit-making corporations engaged in higher education cannot be evaluated with the standards developed by Middle States because they have a double goal—education and profit-making. (JA. 1006, 1355). What is economically efficient is not necessarily educationally efficacious. Indeed, the two goals may be at cross purposes. (JA. 1291). The proprietary institution has a conflict of interest by its very organization and operation. (JA. 1421; 1374(28); 1112-13). "If a person is thinking on the one hand of profits, thinking on the other hand of educational policy, and you mix these two, how can you ever be sure that you are getting an opinion which is wholeheartedly, completely disinterested on behalf of the public? I don't think you can be sure of that." (JA. 1118 Brubacher).[11]

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[11] The Middle States criterion has a valid historical basis as well. Commenting upon a statement by a witness for Plaintiff that "proprietary institutions may indeed be presumed to have those conditions more conducive to institutions of integrity, institutional independence, and institutional unity than the colleges and universities, non-profit though they may be, which are dependent upon their flow of funds from public taxing bodies" (J.A. 1118), Dr. John S. Brubacher, former Professor of Higher Education at the University of Michigan and an expert on the history of American education stated: " . . . [M]y own opinion, looking at it in terms of historical background, I just don't know that this sort of thing happens. As a matter of fact, the great majority of our institutions have felt that the public interest is best served by a non-profit board of . . . [trustees] and so it seems that history tends to contradict his rather suppositional statement." (J.A. 1119).

"The nonprofit tradition in higher education has a substantial history, which goes back into the Hellenistic times . . ." (J.A. 1374(13)); (Dr. John Stoops, Dean, School of Education, Lehigh University).

The essential goal of a profit-making corporation is to return profit on invested capital. Profit is the corporation's primary responsibility. Each decision is, and must be, made in terms of the most profitable alternatives for the stockholders. (JA. 1279, 1357). Thus, as stated by the President of the New School of Social Research:

> *"If they* [the two goals of profit and education] *are both in the same institution, it is quite obvious that a question of a return on capital must be the first and primary consideration because if the capital leaves the institution, the institution no longer exists for whatever secondary and tertiary function it may try to provide and so that a primary profit motive, which all profit organizations must necessarily have to survive, would seem to be to make the educational goal or the educational motive secondary."* (J.A. 1355) (Emphasis added).

The evaluative criteria developed by Middle States are not suitable to the evaluation and accreditation of profit-making corporations engaged in higher education. The Middle States approach becomes irrelevant where a critical component of the goal of an institution is not educational, but rather personal gain for the owners.[12] (J.A. 118; 1130-32; 1136; 1139; 1644). As stated by the former Provost of

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[12] Three proprietary secondary schools, among the "oldest on the [accredited] list," remain on the Middle States membership list as "grandfathers" out of considerations of fairness. (J.A. 472). The three proprietary institutions of higher education in the Western Association are all that remain of a group of "highly specialized" institutions which "were not organized according to the normal pattern of a liberal arts colleges," specializing in such subjects as music and photography but with a liberal arts foundation. In 1965 these three were added as "grandfathers" to the Western Association's regular membership. (J.A. 481-483, 486). Since the institution of this suit in 1966, two of the three schools have become nonprofit.

Lehigh University, an experienced member of evaluation teams,

> "... [T]his basic difference between the two kinds of institutions, proprietary and non-proprietary is so fundamental and so critical that the institutions cannot be considered together. They cannot be evaluated by the same instruments. A proprietary institution could not be evaluated appropriately and adequately, using the documents which Middle States has developed for its current eligible membership or applicants. [I]t could not use on an evaluating team the men who have built their experience ... in evaluation by evaluating non-profit institutions. The difference between the two is so great that ... [a] wholly different set of instruments and standards would have to be devised for the evaluation of proprietary institutions ..." (J.A. 880-881)

To abandon the nonprofit criterion would require "a whole new instrument of evaluation and [development of] a whole new set of evaluators" (J.A. 903). The President of Manhattanville College, also an experienced evaluator, "would not know how to evaluate a proprietary institution" (J.A. 1005).

A complete new set of criteria would have to be developed in order properly to evaluate and accredit a profit-making corporation engaged in higher education. To do so would drastically change the whole direction of Middle States accreditation.[18]

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[18] Indeed, such a change would make Middle States a "public utilities organization", since part of the evaluation would require a subjective decision as to whether 50-60-70-80-90% of the resources being devoted to education—not 100% as in the case of the nonprofit institution—was adequate to serve the aims of the institution and the needs of the students (J.A. 1646). This witness, an experienced

D. The Court Below Applied District of Columbia Common Law Which Does Not Conflict With Other Decisions Or Present An Important Federal Question.

The principal ground upon which the Court of Appeals denied relief to Webster was its determination, under the evolving judicial standards of admission to private associations, that Middle States' nonprofit criterion is a reasonable one. After finding that Webster can operate successfully as a junior college without Middle States' accreditation, the Court then examined Middle States' objectives and held that, given these objectives, Middle States' restriction of membership to nonprofit institutions is a reasonable means of achieving these ends. (Petition, p. A-11).

The Court of Appeals' opinion is based upon its application of common law principles to the facts of this case. Judicial scrutiny of private associations' admission policies is a matter which must be determined on the basis of state or local law or, in this case, the local law in the District of Columbia. No interpretation of the Federal Constitution or a Federal statute is involved. There is no Federal question which needs to be resolved by this Court.

No conflict of authority exists between the Court of Appeals' decision and those of other jurisdictions.

This case does not present the situation in *Falcone* v. *Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791, 799 (1961), where the medical society involved possessed

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evaluator for Middle States and a Vice President of Seton Hall University, N. J., stated that, if Middle States were forced to evaluate proprietary institutions, "the fundamental purposes, what Middle States calls itself, . . . would have to be changed and disregarded" (J.A. 1634-35).

"a virtual monopoly over the use of local hospital facilities," as the result of which, it could, by denying membership, "preclude . . . [Dr. Falcone] from successfully continuing in his practice of obstetrics and surgery." The same is true of *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1945), which involved the deprivation of plaintiff's livelihood by "a closed union coupled with a closed shop," the "fundamental question" being whether such a situation was "a legitimate objective of organized labor." And in *Pinsker* v. *Pacific Coast Soc'ty of Orthodontists*, 75 Cal. Reptr. 712 (Cal. App. 1969), *reversed*, 81 Cal. Rptr. 623, 460 P.2d 495, 497 (S. Ct. 1969), the exclusion of plaintiff, a fully qualified dentist, was based upon an "off the record" reason involving the fact that plaintiff was practising with a nonmember dentist, the termination of which relationship would mean that "your application might be favorably reconsidered."

None of these decisions is inconsistent with that of the Court of Appeals below.

E. Webster Has Established No Infringement Of Constitutional Rights.

In order to apply due process restraints to Middle States, Webster must show that Middle States' activities are "state action". *E.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 506. Webster then must show that the nonprofit standard was unreasonable state action as applied to it. The Court of Appeals below held that, even assuming Middle States' activities are such "state action", Webster had failed to prove that the standard was unreasonable and therefore no violation of

due process had occurred.[14] Indeed, that Court held, and Webster has not challenged, that the standard is a reasonable means used by Middle States to carry out its underlying objectives—to improve higher education. (Petition, p. A.-13). Further, due process was not denied by unconstitutional internal procedures (*Id.* at p. A-8, fn. 28). Thus, Middle States has acted within the bounds of its allowable

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[14] The Court of Appeals assumed, without deciding, that Middle States' activities are "state action" subject to the Fifth Amendment. (Petition, p. A-14). That issue is not now before this Court on the Petition. However, Middle States submits that its activities do not, in any sense, constitute "state action". As the U.S. Office of Education recognizes, Middle States is a "non-governmental voluntary" organization (DX 145A, App. p. A-3). Federal and State contribution of funds and property, the alleged impression of higher education with the public interest, and any incidental effect upon the status of Webster arising from the unavailability of federal funds, by statutory provision, because it is proprietary do not make Middle States' evaluation and accreditation "state action". There is no State involvement "with the activity that caused the injury". *Powe* v. *Miles*, 407 F. 2d 73, 81 (2d Cir. 1968) (Alfred University's involvement with New York State insufficient to make university's actions those of state); *Counts* v. *Voorhees College*, 312 F. Supp. 598, 607 (D.S.C. 1970) (no State action involved where university disciplined students); *Grossner* v. *Trustees of Columbia University*, 287 F. Supp. 535, 548-549 (S.D.N.Y. 1968) (Columbia University action in disciplining students not state action); *Parsons College, Inc.* v. *North Central Association*, 271 F. Supp. 65, 70 (N.D. Ill. 1967) (withdrawal of accreditation by Association not State action and not unreasonable in itself); *Salter* v. *New York State Psychological Ass'n*, 14 N.Y. 2d 100, 198 N.E. 2d 250, 253 (1964) ("Co-operation and leadership, advice and reliance on advice—these are shown, but not shown is delegation by an agency of the State"): see *Browns* v. *Mitchell*, 409 F. 2d 593, 596 (10th Cir. 1969) (no State involvement with University of Denver disciplinary action because of tax exemption).

discretion, particularly in view of its long experience in evaluation and accreditation matters (*Id.* at p. A-14).[15]

This disposition by the Court of Appeals is certainly in accordance with the decisions of this Court. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 596 (where municipal ordinance which prohibited mining excavation below the water table, was challenged by defendant mining operation as violation of due process, it was held that defendant did not sustain the burden of showing that the ordinance was unreasonable as it affected the defendant); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 ("All [exercises by the states of their police power] are entitled to the same presumption of validity when challenged under the Due Process Clause of the Fourteenth Amendment."); *Salsburg* v. *Maryland*, 346 U.S. 545, 553 ("The presumption of reasonableness is with the State."); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 ("But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."). There is no conflict here which needs to be resolved by the Court.

Webster's First Amendment argument is a matter which is not in issue before this Court. No one has denied Webster the right to operate a proprietary school in the District of Columbia. Middle States does not license Webster. The

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[15] Petitioner's Equal Protection argument, which it never really formulated or pressed in the Courts below, can be disposed of on the same grounds. A violation of the Equal Protection Clause requires an "invidious discrimination". *Ferguson* v. *Skrupa*, 372 U.S. 726, 732. Since the distinction made by Middle States between profit making institutions and nonprofit institutions was held by the Court to be a reasonable classification, there could, therefore, be no invidious discrimination against Petitioner.

Court of Appeals specifically held that Middle States had not infringed upon Webster's right to operate a proprietary junior college. (Petition, p. A-9-A-11).

Even if this were in issue, the right to operate a proprietary educational institution is not one protected by the First Amendment. That amendment protects "freedom to advocate ideas," particularly where the State licensing authority may impose a prior restraint. Cf. *Kinsley Corp.* v. *Regents of the University of the State of New York*, 360 U.S. 684, 688. The constitutional restraint does not guarantee the right to make money, where freedom of speech may be incidentally—if at all—involved. *Valentine* v. *Christensen*, 316 U.S. 51, 54-55 (licensing valid where merchant printed advertising on one side of sheet and claimed First Amendment protection because of the expression of ideas on the other side); *In Re Porterfield*, 28 Cal. 2d 91, 168 P. 2d 706, 713 (S. Ct. 1946) ("freedom of speech . . . includes, in the main . . . freedom of expressions of political, sociological, religious and economic subjects, not commercial activities to which speech is only an incident or means"). Compare *Jackson* v. *Darrier*, 424 F. 2d 213, 217-218 (6th Cir. 1970), *cert. denied*, 39 U.S. LAW WEEK 3149 (school regulation against long hair upheld as to student who claimed such hair needed in order to play in rock band; "we agree . . . that 'the growing of hair for purely commercial purposes is not protected by the First Amendment's guarantee of freedom of speech' ").

CONCLUSION

The Petition for Certiorari raises no issue of sufficient importance to justify consideration by this Court, points to no conflict of decisions, and shows no error in the Court below. The Petition should be denied.

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October 26, 1970

APPENDIX

STATUTES

NATIONAL DEFENSE EDUCATION ACT OF 1958, HIGHER EDUCATION ACT OF 1965 AND HIGHER EDUCATION AMENDMENTS OF 1968:

20 U.S.C.:

§ 401.

The Congress reaffirms the principle and declares that the States and local communities have and must retain control over and primary responsibility for public education.

§ 402.

Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system.

§ 1201.

(j) The term "combination of institutions of higher education" means a group of institutions of higher education that have entered into a cooperative arrangement for the purpose of carrying out a common objective, or a public or private nonprofit agency, organization, or institution designated or created by a group of institutions of higher education for the purpose of carrying out a common objective on their behalf.

§ 1085.

(b) [An unaccredited institution is eligible if it] is an institution whose credits are accepted on transfer by *not less than three institutions* which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

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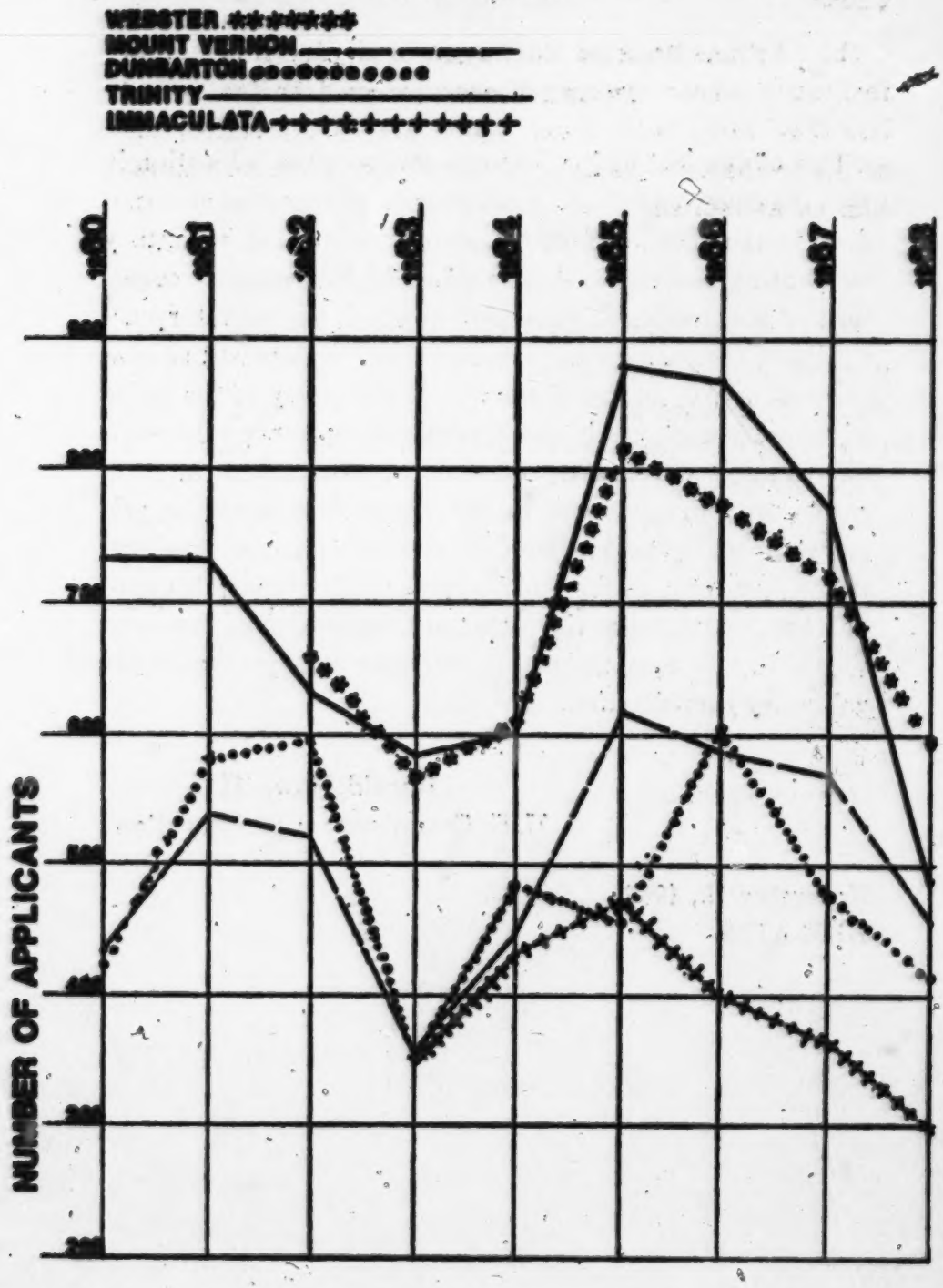
If the Commissioner determines that a particular category of such schools does not meet the requirements of clause (5) because there is no nationally recognized accrediting agency or association qualified to accredit schools in such category, he shall, pending the establishment of such an accrediting agency or association, appoint an advisory committee, composed of persons specially qualified to evaluate training provided by schools in such category, which shall (i) prescribe the standards of content, scope and quality which must be met in order to qualify schools in such category to participate in the program pursuant to this part, and (ii) determine whether particular schools not meeting the requirements of clause (5) meet those standards.

The following graph shows applications to women's colleges in the District of Columbia:



U. S. Office of Education
Policy Statement

The Role of Voluntary Accreditation In the United States

One of the distinctive features of American education is that the development and maintenance of educational standards is the responsibility of non-governmental, voluntary accrediting associations. The Office of Education is cognizant of the invaluable contribution which the voluntary accrediting associations have made to the development of educational quality in the Nation. It is the policy of the Office of Education generally to support and encourage the various recognized voluntary accrediting associations in their respective activities, and to endorse their role as the primary agents in the development and maintenance of educational standards in the United States. The Office also supports and encourages the National Commission on Accrediting in its role as a national coordinator and spokesman for voluntary accreditation.

Harold Howe II
U. S. Commissioner of Education

November 19, 1968
BHE-AIES